to note what Dr. Thayer, as the celebrated Weld Professor of Law at Harvard University said in his Preliminary Treatise on Evidence at the Common Law as to the operation of the so-called rule forbidding the giving of opinion evidence.

We almost see a prophecy therein, although somewhat slow of fulfillment.

At page 523 et seq. he said:

"It is traceable easily to the same source as the hearsay rule. It was for the jury to form opinions, and draw inferences and conclusions, and not for the witness. He was merely to bring in to the jury, or the judge, the raw material of fact, on which their minds were to work. If the witness spoke directly to the very fact in issue, the jury were to consider whether to believe his statements or not; if to other facts, of an evidential sort, then the jury were to judge of their import and their tendency. The witness was not to say that he 'thought' or 'believed' so and so; it was for the jury to say what they thought and believed. The witness must say what he had 'seen and heard'; he was an *oyant et vyant*. But then, simple as this sounds, the distinction could not serve in many nice and critical inquiries. In the loose and easy administration of the law of trials that existed as long as juries went on their own knowledge, and needed no witnesses or evidence at all, and at a time when, even if they had witnesses, they were at liberty to disregard them and to follow their own personal information, it was possible to get along without nice discriminations; so that the law of evidence had hardly any development at all until within the last two centuries; and it was but slight before the present century. In a sense all testimony to matter of fact is opinion evidence; i. e., it is a conclusion formed from phenomena and mental impressions. Yet that is not the way we talk in courts or in common life. Where shall the line be drawn? When does matter of fact first become matter of opinion? A difficult question; but some things are clear. There are questions which require special training and knowledge to answer them. A jury, unless it be one of experts, and, as such, ill adapted, perhaps, for the general purposes of trials, cannot deal with them. On such questions, then, the ordinary jury may be assisted by skilled witnesses, who give their opinions. There are other questions, not requiring skill or training, but only special opportunities of observation, like handwriting and the value of property, on which opinions of ordinary witnesses having such opportunities may be given. How far does this go? There is much apparent perplexity in the cases. In a very great degree it results from differences of practical judgment in applying an admitted rule,—the admitted rule being that opinion evidence is not generally receivable, and the difference arising from differing judgments as to what is and what is not really to be called opinion evidence in the sense of the rule. It has been said, judicially, that 'there is, in truth, no general rule requiring the rejection of opinions as evidence.' Without acceding quite literally to that, there is ground for saying that, in the main, any rule excluding opinion evidence is limited to cases where, in the judgment of the court, it will not be helpful to the jury. Whether accepted in terms or not, this view largely governs the administration of the rule. It is obvious that such a principle must allow a very great range of permissible difference in judgment; and that conclusions of that character ought not, usually, to be regarded as subject to review by higher courts. Unluckily the matter is often treated by the courts with much too heavy a hand; and the quantity of decisions on the subject is most unreasonably swollen."

Can there be any doubt in the face of such a presentation of the rules of practice as to the admission of evidence, that the real difficulty for the past quarter of a century in the matter of a proper investigation into the truth by the aid of medical expert testimony has been almost entirely due to lack of proper education of those coming to the bar and lack of understanding by the people as to what is needful in that behalf?

OFFICIAL MEDICAL EXPERTS.*

By WILLIAM M. CANNON, San Francisco.

The activities of the so-called three learned professions, religion, medicine and law, carry them along lines which are usually quite distinct. Occasionally, however, their functions to some extent merge or blend with one another.

In the administration of the law, religion and law very rarely come into contact. However, they are not absolutely divorced, because occasions arise when the consideration of questions of ecclesiastical law is necessary to the decision of questions of fact in legal proceedings. I remember one instance where, in order to determine a controverted question of fact, it was necessary to call experts on ecclesiastical law and to delve into decretal orders of popes and councils made hundreds of years ago.

Religion and medicine seldom trespass on each other's preserves. Representatives of these professions often meet at the bedside of the dying but they have their separate duties to perform and there is no intermingling of activities.

Medicine and law, however, are constantly coming together, and frequently become inextricably blended; but when they do so there is no clash of authority. On the contrary, they work in entire harmony, medicine furnishing necessary facts and law the rule of action to be applied to them. Thus medicine frequently enables law to solve complicated questions of mixed law and fact. In such cases each, without the aid of the other, would be powerless to accomplish beneficial results.

Medical jurisprudence, sometimes called forensic medicine, embraces a wide range of subjects. In both civil and criminal courts questions are constantly arising where material facts cannot be determined without recourse to medicine. Such facts can be supplied only through the much abused medical expert.

Cases involving causes of death or injury, relations of the sexes, sanity, paternity, besides numerous others, require the assistance of the medical

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expert, whose examination covers an infinite variety of subjects concerning which the lay mind is utterly lacking in knowledge. Upon such subjects, therefore, the law must look to the medical expert as its only source of enlightenment.

The importance of forensic medicine, and the law's helplessness without it, renders it vitally necessary that medical experts should be above all else, honest and sincere in their testimony. As the cause of death or injury is frequently obscure and depends upon a nice and delicate balancing of symptoms, it must be apparent that unless the medical expert is honest he is a positive injury instead of an aid to the law. Even great ability is more harmful than otherwise unless combined with an honest and sincere effort to arrive at the true solution of intricate medical questions. Therefore the one great quality to cultivate in the medical expert is common honesty. This is not a criticism of the medical profession or of medical experts generally. The profession is prolific of high-class, conscientious, scientific men whose integrity is unimpeachable and whose testimony cannot be affected by any unworthy motive or consideration. Such men "hew to the line, let the chips fall where they may." The result of my experience with such experts is that litigants have nothing to fear from them.

But it is regrettable that this certificate of character cannot be given to all medical experts. Too frequently we fail to receive their honest opinions. Too frequently their testimony, when not indicating gross ignorance, is swayed by interest, prejudice, or other improper motive. 'Tis a consummation devoutly to be wished, therefore, that medical experts should always give testimony frankly and honestly and without considering its effect upon the outcome of the trial; but this utopian condition cannot be expected to result from the appointment of official medical experts.

Medical experts, generally speaking, are of two classes: (1) Those testifying to facts within their knowledge and giving opinions based thereon, and, (2) those giving opinions based upon an assumed state of facts or hypothetical case.

Official medical experts cannot enter the field covered by the first class. In such cases the witness is usually the attending physician. He testifies to the result of his own observations and bases his expert opinion thereon. It is only in cases where an opinion is to be given upon an hypothetical case or upon an examination of a patient plus assumed facts, that the services of an official medical expert could possibly be required.

Sometimes, especially in suits for damages for personal injury or death, the medical attendant testifies to facts within his knowledge and observation, and he is also questioned as a medical expert, both upon his own knowledge and the assumed existence of other facts. For instance, a medical attendant will not be permitted to give an opinion based upon his own personal observation of a patient and the history of the case as related by the patient. What the patient has told him is regarded as hearsay. In dealing with the case privately the physician forms his opinion and acts both upon what he discovers objectively and the history of the case. In court, however, while his testimony is receivable as to objective symptoms, he cannot testify to subjective symptoms nor can he give the history of the case. Therefore when asked his opinion as an expert he bases it partly on his personal knowledge and partly on the history of the case as given by the witnesses in court, not as given to him privately.

In actions of this kind the great question always is whether the condition under investigation was caused by trauma. If so, the defendant may be held responsible for the injuries or death, otherwise not.

In many cases this question is not one of expert testimony at all. If a person has his foot crushed in a railroad accident the injuries are obvious to any person. The physician, however, by reason of his peculiar knowledge, can describe the character and extent of the injuries and give his expert opinion as to the consequences, whether temporary or permanent. But cases often arise of such an obscure character that it is only through the opinion of a medical expert that any light can be thrown on the subject at all. For instance, constant pains in the spine are complained of by a patient who asserts that they were not present before the accident but always present thereafter. The medical expert, upon examination, finds nothing objective. The delicate question then arises as to whether, from a mere complaint of pain, a subjective symptom, the conclusion of spinal injury can be drawn. Again, a nervously constituted person becomes involved in an accident and complains of increased nervousness as a result. The symptoms of nervous shock being mainly subjective, it becomes an exceedingly difficult and delicate matter for any expert to determine to what extent, if at all, the previous nervous condition has been aggravated by the accident.

Instances could be multiplied which would demonstrate to what a great extent litigants must rely upon the honesty of medical experts, and how easy and safe it is for dishonest medical experts to thwart justice by giving rash or dishonest opinions. In all obscure cases it is just as easy and safe for an expert to testify one way as the other. Consequently, if an unprincipled practitioner can collect a large outstanding bill only by winning a case for his patient, the temptation to depart from the strict line of righteousness is usually overwhelming.

That abuses exist along this line there can be no question. I could fill a volume with instances coming under my personal observation where the testimony of medical experts has been influenced by interest in the result of the suit, and by considerations utterly at variance with the facts.

The appointment of official medical experts would not remedy the difficulty because, as already explained, their field must necessarily be limited, and because the abuse exists mainly with the physician who has a pecuniary interest in the result of his own testimony, and who therefore goes to great lengths in assisting his patient to win the case.

As the evil is one which cannot be reached by official medical experts, the question is, how can it be uprooted? In my opinion the solution of the problem is in the hands of the physicians themselves, acting through their medical societies.

The principal thing is to produce in court only honest opinions and to eliminate interest, prejudice, and other unworthy motives. This can be accomplished if medical societies will, by the adoption of strict by-laws, provide for the appointment of a committee of experts and require every physician who is to be called as a witness, to lay the case in advance before such committee. By such means the experts on opposite sides would be brought face to face before the committee for consultation and examination, after which both would be free to testify. If they are honest they will listen to the advice of the committee precisely as they would listen to that of a consultant in any case.

With honest and conscientious witnesses (with which the profession abounds) the probabilities are that the consultation will bring about unanimity of opinion, and there will be no conflict in court.

In the case of experts called to give opinions on a hypothetical case or upon the result of an examination in connection with assumed facts, the by-laws could provide that such an expert should always consult with the committee, both as to facts appearing upon the examination and as to the hypothetical case. If, after consultation with the committee, there should still be difference of opinion, such difference would at least be an honest one.

It may be objected to this course that courts can, by process of subpena, force medical experts to testify. The answer is that no court can force any medical expert to give an opinion until he has one, and he is not required to have one until he has exhausted all legitimate means of forming a correct one.

Should physicians outside of the society refuse to appear before the committee of experts before testifying, such refusal of itself would probably be sufficient to impeach their testimony and render it unworthy of belief by a jury. Certain it is that as between an expert witness who gives an opinion formed after a full study of authorities and consultation with eminent associates, and one who refuses to consult and sets himself up against the consensus of opinion of his brothers, a jury should have little difficulty in determining where the truth actually lies.

Official medical experts appointed by the court on motion of either party and chosen from such a committee of experts would be of great benefit in arriving at the truth in obscure cases. To that extent I favor the appointment of official medical experts; but, as already explained, the evil complained of cannot be eradicated except by some drastic action by the profession itself.

In the last analysis, the opinion of a medical expert is of little consequence unless the jury has confidence in him and is convinced of his honesty and sincerity. Where it appears that a physician is interested in the result, or is woefully ignorant, as too frequently appears, or has not prepared himself sufficiently for the ordeal of cross-examination, or where for any reason the jury may readily conclude that he is not fair, his testimony carries little weight. If, to oppose such a witness, either party should call men of standing who have not hesitated to consult fully with their fellows in the profession before attempting to decide, by their mere opinions, delicate questions of fact involving serious consequences, it is plain that juries whose only desire is to arrive at the truth, would never hesitate to condemn the expert who, for his own personal ends, sets up his opinion in opposition to that of the combined medical fraternity.

My conclusion is that medical experts, while they would undoubtedly assist in remedying the evil, would not eradicate it, but that great good might be accomplished by putting in force some such plan as above outlined.

THE MEDICAL EXPERT IN AMERICAN JURISPRUDENCE.*

By ANDREW STEWART LOBINGIER, A. B., M. D.,
Los Angeles.

There has been a growing sentiment in American courts of justice that the testimony of the expert witness must be received with a conscious discount and reserve. It is widely accepted that the abuses which attend the offering of expert testimony are many and flagrant. But it is equally obvious that these abuses are as clearly the outgrowth of the present method of procedure as they are of the mental obliquity of the witnesses who are called. For more than a generation the testimony of the medical expert has been a purchasable commodity. From a factor whose learning and experience should prove a distinct assistance to the court in determining the adjudication of technical difficulties, the medical expert has, by virtue of the false position he has been brought to occupy, become an object of ridicule and contempt.

There are several impressive reasons for this: Through the present method of choosing the expert witness, he is at once the victim of bias and becomes an advocate for the side that employs and pays him. Experts are not selected chiefly on account of eminent fitness or special training in the subject on which testimony is to be offered, but as to whether they shall prove to be strong partisans and clever defenders of the side which employs them and of which for the time being they are a willing appanage. Such a system of selecting the expert and the coarse and frequently incompetent methods of counsel in direct and cross-examination, have created an aversion among scholarly professional men for appearance on the witness stand. The result is that the best talent is rarely obtainable and the choice must lie amongst duller minds, less sensitive to the harsh usages of a court of law.

We may assume that counsel is not supposed to have an intimate acquaintance with the technical knowledge of the expert whose evidence he is seeking to develop. But no one who has had experience in court has failed to note the awkward

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